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91-424

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1991

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KATHY HILLIARD,
Petitioner,

vs.

CITY AND COUNTY OF DENVER; DENVER POLICE DEPARTMENT,
Defendants,

and

CAPTAIN MICHAEL O'NEILL, SERGEANT ANTHONY IACOVETTA, SERGEANT MARY BETH KLEE, OFFICER SHERRY MANNING,
Respondents.

JEFFREY N. HERREN, P.C.

Jeffrey N. Herren, #11374
5353 W. Dartmouth Ave., #500
Lakewood, CO 80227
(303) 763-9202

QUESTIONS PRESENTED FOR REVIEW

1. Whether the issues presented herein are similar to those presented in Collins v. Harker Heights, No. 90-1279 (1991) and therefore proper for this Court's review.

2. Whether Petitioner's constitutional right to personal security was "clearly established" and whether the decision of the Tenth Circuit not finding such right is in direct conflict with decisions by other circuits.

3. Whether Colorado Revised Statute § 25-1-310 which requires police officers to take intoxicated persons who are determined to be a danger to themselves or others creates substantive due process rights to protective services that cannot be deprived without due process of law.

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Federal and State Decision Law

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JURISDICTIONAL STATEMENT

Judgment was entered in this matter on April 24, 1991 (Appendix I:20)[1]. A Petition for Re-hearing with a suggestion for rehearing en banc was filed on May 9, 1991. The Petition was denied on June 12, 1991. (Appendix IV:1). Jurisdiction is conferred to this Court pursuant to 28 U.S.C. § 1254 in that this Court has jurisdiction to review decisions of United States Courts of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS MATTER

The issues presented herein involve the following: (a) Title 42 United States Code § 1983; (b) Section 1 of the Fourteenth Amendment of the Constitution of the United States; (c) Colorado

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[1] The Appendix in this matter consists of six documents. Appendix I:20 refers to document I, page 20.

Revised Statute § 25-1-310 (1989) which is included in Appendix V.

BASIS OF FEDERAL JURISDICTION FOR THE COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 1291 in that it has jurisdiction of appeals from all final decisions of the District Court for the District of Colorado.

STATEMENT OF FACTS

Petitioner was a passenger in an automobile driven by her male companion which was involved in a minor traffic accident. The accident occurred in a high crime area of Denver on August 12, 1988 at approximately 11:15 p.m. The Respondents are Denver County police officers who were on the scene and investigated the accident involving the Petitioner's companion and a

second vehicle. Those officers were Captain Michael O'Neill, Commander of District Four, the district within the City and County of Denver in which the incident occurred; Sergeant Anthony Iacovetta, the first officer on the scene; Sherry Manning, a DUI training officer; and Mary Beth Klee, a police trainee who was riding with Officer Manning. During the investigation, the Respondents arrested Petitioner's companion for suspicion of driving under the influence of alcohol. After questioning her, Respondents determined that Petitioner was also intoxicated, ordered her not to drive, locked and impounded her companion's vehicle, and left her on the street near a convenience store in a high crime area. At approximately 11:30 p.m., the Respondents then left the scene, abandoning Petitioner. Respondents

alleged that before taking him into custody, Petitioner's companion handed Petitioner a large sum of money which she could have used to get home. After attempting to make phone calls from a pay phone, Petitioner walked back toward the vehicle. Before reaching the vehicle, she was attacked, dragged behind the convenience store, robbed, beaten, and sexually assaulted by a third party. She was found early the next morning naked, bleeding, barely conscious, and suffering from several severe head and bodily injuries.

Petitioner submitted an affidavit of an expert toxicologist who determined that the blood\alcohol level in Petitioner at the time the Respondents were in contact with her was between .28 and .38, nearly 3 to 4 times greater than the legal limit (Appendix VI:3). These findings

collaborated results of a blood test performed at the treating hospital. The findings in the affidavit were undisputed by Respondents.

Petitioner brought suit under 42 USC § 1983 and state tort law alleging that her constitutional rights to life, liberty, travel, and personal integrity had been violated. Petitioner also alleged that Respondents failed to take Petitioner into protective custody pursuant to Colorado's emergency commitment statute, Colorado Revised Statute § 25-1-310 (1989) (Appendix V), and failure to do so violated her constitutional rights.

The Respondents moved for summary judgment alleging that the law was not clearly established and they were immune from suit. The district court dismissed the pendent state claims and several of

Petitioner's § 1983 claims. It left standing Petitioner's § 1983 claims that the Respondents actions showed gross negligence, recklessness, or deliberate indifference in ignoring the state emergency commitment statute's mandatory provisions and thus violated her Fourteenth Amendment life and liberty interests. The district court reasoned that the discretionary duty of the police officers was already exercised under Colorado Revised Statute § 25-1-310 when they determined that Petitioner was intoxicated. Thereafter, § 25-1-310 uses mandatory language that required the Respondents to determine if she was a danger to herself or others. The court found that in this case, there exists, at a minimum, an issue of material fact as to whether the Respondents ever considered the clear provisions of § 25-1-310. The

district court also let stand a § 1983 claim based upon a "failure to properly train" theory which is not part of this appeal.

On appeal, the Court of Appeals for the Tenth Circuit ("Tenth Circuit") affirmed the dismissal of Petitioner's § state tort-based claims and general § 1983 claims and reversed the district court with regard to the surviving § 1983-based claims. Without reaching the issue of whether the Petitioner had identified a liberty interest that was implicated under these facts, the Tenth Circuit found that the law with regard to a noncustodial relationship between the Respondents and Petitioner was not "clearly established" within the meaning of Harlow v. Fitzgerald, 457 U.S. 800 (1982). In so doing, it distinguished Ingraham v. Wright, 430 U.S. 651 (1977), White v.

Rochford, 592 F.2d 381 (7th Cir.1979), and Wood v. Ostrander, 879 F.2d 583 (9th Cir.1989), cert.denied, Ostrander v. Wood, 111 S.Ct. 341 (1990). The Court based its opinion in part on DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), finding that there is no constitutional duty on the part of state or local government officials to rescue their citizens from invasions by private actors.

REASONS FOR GRANTING WRIT

1.

The Issues Presented Herein are Indistinguishable from Those Issues Accepted On Certiorari by This Court In Collins v. Harker Heights, No. 90-1279

On April 15, 1991, this Court accepted certiorari in Collins v. Harker Heights, 916 F.2d 284 (5th Cir.1990). In that case, the Petitioner argued for

certiorari on two grounds. First that the decision of the Court of Appeals for the Fifth Circuit directly conflicted with the Eighth Circuit's decision in Ruge v. City of Bellevue, 892 F.2d 738 (8th Cir.1989). Second, she argued that important constitutional questions that have been left unanswered by this Court should be resolved. Specifically, the Petitioner presented the question of whether a state statute gave to a class of individuals--individuals the statute was designed to protect-- an entitlement to protective services that cannot be deprived without due process of law. These are precisely the questions presented herein and the reasons for granting a Writ of Certiorari are no less important here than they were in Collins.

II.

The Decision of the Tenth Circuit is in Direct Conflict with Decisions in Several Circuits That Can Only Be Resolved By This Court

The decision of the Tenth Circuit is in direct conflict with a decision by the United States Court of Appeals for the Ninth Circuit, Wood v. Ostrander, 879 F.2d 583 (9th Cir.1989), cert.denied, Ostrander v. Wood, 111 S.Ct. 341 (1990). The Tenth Circuit held that the right to personal security was not "clearly established" reasoning that the existence of Wood, and a similar case, White v. Rochford, 592 F.2d 381 (7th Cir.1979) does not "clearly establish" the viability of Ingraham's personal security guarantee in "noncustodial settings" (Appendix I:16). In direct contrast, the Ninth Circuit in Wood made its finding of "clearly established" law based upon the existence

of just one decision, White and White's precedential effect in the Ninth Circuit.

In direct contrast to the Tenth Circuit, the Wood court specifically grounded its findings of a violation of a liberty interest in a line of cases beginning with Ingraham and subsequently followed in the Seventh Circuit by White.

The Tenth Circuit called the facts in Wood "strikingly similar" to the facts in this case (Appendix I:15). The plaintiff in Wood was the sober passenger of a vehicle stopped by a state actor in a high crime area late at night. The driver was arrested for driving while intoxicated and taken into custody. The keys to the vehicle were taken and plaintiff was ordered out of the car. Plaintiff was raped by a third party after she accepted

a ride from him.[2]

Wood filed suit under 42 USC § 1983, alleging the deprivation of right to personal integrity without due process. The district court granted the defendants' motion for summary judgment and the Court of Appeals for the Ninth Circuit reversed, denying summary judgment. The Court wrote:

> Although [the state trooper] himself did not assault Wood, he allegedly acted in callous disregard for Wood's physical security, a liberty interest protected by the Constitution. See Ingraham v. Wright, [430 U.S. 651 (1977)].

Wood, 879 F.2d at 589.

In this case, the Tenth Circuit based its reversal of the district court's decision on a flawed analysis. Instead of first seeking an answer to the dual

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[2] In Wood, there existed no statute requiring state actor to provide stranded persons protection or transportation.

questions that are dispositive in noncustodial situations: "Did the defendant take any action to create or exacerbate the danger from which harm to the plaintiff arose?" and its attendant question: "Was there thus a special relationship created between the Respondents and Petitioner?", the Tenth Circuit limited the scope of its inquiry to the question: "Was the law 'clearly established' with regard to 'noncustodial settings'." By taking this approach, the Tenth Circuit limited the scope of the "special relationship" rule.

Finding the law with regard to "noncustodial settings" was not "clearly established," the Tenth Circuit incorrectly relied upon the cases which are decided on other grounds not at issue in this case. The Tenth Circuit held that two cases, White and Wood, do not

constitute "clearly established" law (Appendix I:16) when compared to the "long list of cases cited in Archie v. City of Racine, 847 F.2d Cir.1988), cert.denied, 109 S.Ct. 1338 (1989)"[3].

The "long list of cases" on pages 1220-21 of Archie, to which the Tenth Circuit refers includes Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir.1985), cert.denied, 475 U.S. 1047 (1986); Jackson v. Byrne, 738 F.2d 1443 (7th Cir.1984); Jackson v. City of Joliet, 715 F.2d 1220 (7th Cir.1983); Donald v. Polk County, 836 F.2d 376 (7th Cir.1988); Walker v. Rowe, 791 F.2d 507 (7th Cir.1986), cert.denied, 479 U.S. 994 (1986); Hinman v. Lincoln Towing Service, Inc., 771 F.2d 189 (7th Cir.1985); Beard v. O'Neal, 728 F.2d 894

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[3] Archie held that state and local officials generally do not have a duty to rescue the citizens from invasions by private actors.

(7th Cir.1984); and Bowers v. DeVito, 686 F.2d 616 (7th Cir.1982). In each of these cases the court ruled there was no duty to protect based upon the fact that no "special relationship" existed between the defendant and plaintiff (i.e., the defendant took no action to create or worsen the situation from which harm to the plaintiff arose).

The most significant point, however, is the fact that several of these cases cite White v. Rochford, 592 F.2d 381 (7th Cir.1979) and *specifically* distinguish absence of affirmative action with presence of affirmative action. See e.g. Jackson v. Byrne, 738 F.2d at 1147; Jackson v. City of Joliet, 715 F.2d at 1204; Walker, 791 F.2d at 511; Ellsworth, 774 F.2d at 185; Archie, 847 F.2d at 1223.

In conclusion, the Petitioner asserts

that, based upon Ingraham, White, and Wood the Petitioner had a protected liberty interest that was violated when the state acted affirmatively to expose her to a known and reasonable foreseeable danger of harm on August 12, 1988. The prior cases clearly establish that there existed a duty to protect on the part of the state actor who creates the danger and further that this "danger creation" causes a "special relationship" to exist. This duty is not based upon the necessity of a finding of a custodial setting. This duty is based upon a creation of a danger. The law at the time of this incident was "clearly established" under the Eastwood[4] test employed by the Tenth Circuit. See also Anderson v. Creighton, --- U.S. ---,

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[4] Eastwood v. Department of Corrections of the State of Oklahoma, 846 F.2d 627, 630 (10th Cir.1988)

107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); Mitchell v. Forsyth, 472 U.S. 511 (1985).

The question to be asked, as set forth in Anderson, is therefore, "Would a reasonable officer believe that what he was doing was lawful, in light of clearly established law and the information he possessed at the time?" Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir.1986) holds that it is not unreasonable to charge police with the duty of keeping abreast of the law. See also Garcia by Garcia v. Miera, 817 F.2d 650 (10th Cir.1987) (five-month interval was sufficient to put defendants on notice of Tenth Circuit decision); Robinson v. Bibb, 840 F.2d 349, 350, n. 2 (6th Cir.1988) (suggesting that four days may be sufficient for a reasonable police officer to know of recent Supreme Court

decision); Arebaugh v. Dalton, 730 F.2d 970, 973 (4th Cir.1984) (suggesting that 12 days may have been sufficient time for defendant to learn of relevant Supreme Court decision).

It is therefore reasonable to assume the police officers, especially a district commander, (O'Neill) were aware, or should have been aware, of the developments in the law. The emergency commitment statute itself had been enacted in 1977 in its present form and was over 10 years old. The "special relationship" rule had been likewise scrutinized in the Colorado Supreme Court's 1986 opinion in Leake v. Caine, 720 P.2d 152 (Colo.1986)[5].

Recognizing that circumstances may arise in which police have a special duty

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[5] See analysis of purpose of Colorado emergency commitment statute in Leake, 720 P.2d beginning at 160.

to care for persons who otherwise would be considered as part of the "general public", the Colorado Supreme Court discussing in Leake the "special relationship" rule where a state actor can

> assume a duty to a person, induce reliance, create a peril or change the nature of an existing peril.

See Jackson v. Clements, 146 Cal.App.3d 983, 194 Cal.Rptr. 553 (1983); See also Restatement (Second) of Torts §§ 315, 319 (1965).

The police are also charged with keeping abreast of federal decisions. At the time of Petitioner's injuries, White had been good law for almost 10 years. The original Wood decision in the Ninth Circuit was decided in July of 1988. Several other federal cases, including Archie and the cases cited, which, at the time of this incident, were several years

old, specifically distinguish White from the facts present in their opinions. Reasonable police officers on August 12, 1988 would have known, based upon the decisional law both in Colorado and in the circuits, that even without the emergency commitment statute, Petitioner's constitutional rights would be violated by abandoning her after exposing her to considerable harm. In addition, the Wood decision of July 1988, factually on "all fours" with this case, was a strong signal that a "special relationship" could arise in a situation where a state actor creates a danger that resulted in private harm to an individual placed in that dangerous situation.

III.

THE COLORADO EMERGENCY COMMITMENT STATUTE CONVEYS A RIGHT TO PROTECTIVE SERVICES THAT CANNOT BE DENIED WITHOUT DUE PROCESS OF LAW

One of the issues DeShaney left unanswered involves the entitlement to receive protective services in accordance with state law. In DeShaney, the petitioners raised the issue of whether Wisconsin child protection laws conferred a constitutional right to protective services, however, the Court declined to hear that argument because it was not raised prior to the brief to this Court. See DeShaney, 109 S.Ct. at 1003, n.2. Here, Petitioner presents essentially the same question preserved for appeal and offers this Court an opportunity to finally address this issue.

Petitioner has alleged that, in addition to her constitutional rights

under Ingraham (See Argument I), there exists a duty incumbent upon Respondents to protect her based upon Colorado state law. Colorado Revised Statute § 25-1-310(1) (1989) states:

> When any person is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety to himself or others, such person shall be taken into protective custody by law enforcement authorities or an emergency service patrol, acting with probable cause, and placed in an approved treatment facility.

(Appendix V:1)

Thus, under the statute, the Respondents had a specific duty to take her into protective custody. The statute also provides that:

> Law enforcement or emergency service personnel who act in compliance with this section are acting in the course of their official duties and are not criminally or civilly liable therefor.

(Appendix V:1)

Thus they risked no liability had they carried out their official duties and taken Petitioner into protective custody.

It is undisputed that the Petitioner was highly intoxicated when Respondents had contact with her. It is undisputed that Respondents exercised their discretion under the statute and found her to be intoxicated. The Respondents provided no explanation as to why, after having determined that the Petitioner was intoxicated, they failed to provide protection under the statute. The state statute obligated the defendants to take her into protective custody when she was determined to be intoxicated and a danger to herself or others. Whether the Respondents should have made such a finding is a question reliant on facts material to the truth and yet to be established. Having created the danger

the Petitioner faced, the situation was no longer one the Respondents could ignore without depriving Petitioner of her constitutional rights without due process.

Collins v. Harker Heights, 916 F.2d 284 (5th Cir.1990), cert.pending, No. 90-1279 (1991) makes exactly the same argument concerning the Texas Hazard Communication Act conferring

> an entitlement to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in Board of Regents v. Roth, 408 U.S. 564 (1972).

DeShaney, 109 S.Ct. at 1003 n.2.

This Court previously accepted certiorari in Collins, supra. The policy issues at stake in this case are no less important that those discussed in the Collins petition. The emergency commitment statute was passed by the

Colorado Legislature in 1977 to combat the problem of alcohol abuse and alcoholism. The general assembly specifically wanted to "decriminalize" these serious problems and handle them as a public health problem, not a criminal problem. The legislature found that no other health problem has been so seriously neglected and that only by adequately funding monies for this problem would its massive social cost be reduced. Specifically cited to receive state funding were medical detoxification facilities, staff, and patient transportation. See Colorado Revised Statutes, § 25-1-301, Legislative Declaration (Appendix V).

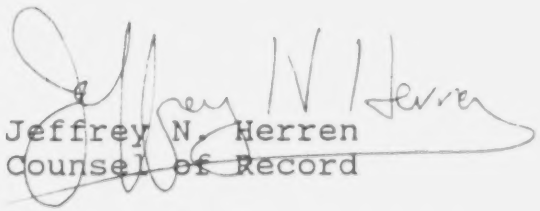
Petitioner has discovered that all of the police and sheriff departments in the Metro-Denver area have a policy of protecting intoxicated passengers they encounter in traffic stops except the

defendant Denver City and County Police Department. The burden of the individual police department is minimal because of the network of treatment centers and free transportation of patients available to the departments. Usually a radio or phone call by police dispatch is all that is required to enforce the emergency commitment statute. When that burden is compared with the tragic cost that Petitioner paid in this case, Respondents failure to protect is even more egregious. Without this Court's intervention the municipality cannot be sued for failing to protect a citizen in the face of a mandatory state statute that supports a serious statewide concern for the public health of its citizens.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



Jeffrey N. Herren
Counsel of Record

CERTIFICATE OF SERVICE

I certify that on the 10th day of September, the foregoing Petition for Writ of Certiorari was served upon the following individuals by placing the same in the U.S. Mail, postage prepaid, and addressed to:

Theodore S. Halaby, Esq.
Robert M. Liechty, Esq.
Halaby and McCrea
Counsel for Respondents
1873 S. Bellaire, Suite 1400
Denver, CO 80222

Louis B. Bruno, Esq.
Bruno, Bruno, and Colin
Counsel for Defendants
One Civic Center Plaza
1560 Broadway, Suite 1099
Denver, CO 80202-5143